84-1115

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LEGAL SERVICES CORPORATION, *et al.*,
Petitioners,

v.

EAST ARKANSAS LEGAL SERVICES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in holding that the decision by the Legal Services Corporation to offset a portion of the 1983 grant awarded to East Arkansas Legal Services because of a significant carryover of unspent 1982 grant funds, pursuant to established corporate policy and without a hearing, constituted an impermissible termination under LSC's Regulations, 45 C.F.R. § 1606, *et seq.*

2. Whether the permanent injunction issued by the District Court and affirmed by the Court of Appeals violated the public interest and was, therefore, improper.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioners respectfully pray this Court issue a Writ of Certiorari to review and reverse the opinion of the United States Court of Appeals for the District of Columbia Circuit (hereafter Court of Appeals), entered in cause number 83-2118 [1] on August 28, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals has been reported at 742 F.2d 1472 (D.C. Cir., 1984) and may be found at

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[1] The Appellee in the Court of Appeals was East Arkansas Legal Services, and the Appellants were the Legal Services Corporation, a corporation; Donald Bogard, President; Dennis Daugherty, Vice-President; and Gregg Hartley, Director of the Office of Field Services. The Legal Services Corporation is a private, nonprofit, District of Columbia corporation established by Act of Congress in the Legal Services Corporation Act of 1974, Public Law 93-355, 42 U.S.C. § 2996, *et seq.* There are no parent, subsidiaries, or affiliates of the Corporation.

pages 1a through 24a of the Attached Appendix (hereafter App.). The opinion of the United States District Court for the District of Columbia (hereafter District Court) has not been reported at this time, but may be found at pages 25a through 31a of the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 17.1(c) of the Rules of this Court to review a decision of the Court of Appeals which has decided an important question of federal law which has not been, but should be, settled by this Court.

The decision of the Court of Appeals was issued on August 28, 1984. A Petition for Rehearing and Suggestion for Rehearing En Banc was timely filed, and on October 16, 1984, the Court of Appeals denied that request. App. pages 37a and 38a. This Petition is timely in that it is filed prior to the expiration of the ninety-day period allowed by 28 U.S.C. § 2101(c).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Legal Services Corporation Act of 1974, as amended in 1977, Public Laws 93-355 and 95-222 (hereafter Act), provides, in part, as follows:

> Section 1006(a):
>
> . . . In addition, the Corporation is authorized—
>
> (I)(A) to provide financial assistance to qualified programs furnishing legal assistance to eligible clients, and to make grants to or contracts with—
>
> (i) individuals, partnerships, firms, corporations, and nonprofit organizations, . . .
>
> for the purpose of providing legal assistance to eligible clients under this title. . . . 42 U.S.C. § 2996e(a).

Section 1007(a):

> With respect to grants or contracts in connection with the provision of legal assistance to eligible clients under this title, the Corporation shall—
>
> . . .
>
> (3) insure that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance to persons in both urban and rural areas; . . . 42 U.S.C. § 2996f(a).

Section 1011:

> . . .
>
> (2) financial assistance under this title shall not be terminated, an application for refunding shall not be denied, and a suspension of financial assistance shall not be continued for longer than thirty days, unless the grantee, contractor, or person or entity receiving financial assistance under this title has been afforded reasonable notice and opportunity for a timely, full, and fair hearing, and, when requested, such hearing shall be conducted by an independent hearing examiner. Such hearing shall be held prior to any final decision by the Corporation to terminate financial assistance or suspend or deny funding. . . . 42 U.S.C. § 2996j.

The Regulations of the Legal Services Corporation (hereafter LSC) provide, in part, as follows:

45 C.F.R. § 1606.2(a):

> "Termination" means a decision that financial assistance to a recipient will be permanently terminated in whole or in part prior to expiration of the recipient's current grant or contract.

45 C.F.R. § 1606.4:

> A grant or contract may be terminated on any of the grounds and under the circumstances stated in § 1606.3, except that termination shall not be based on a Corporation rule, regulation, guideline, or in-

struction that was not in effect when the current grant was made or when the current contract was entered into.

LSC's Fund Balance Instruction, published in the *Federal Register* on January 5, 1983, Vol. 48, No. 3, pages 560 and 561, provides, in part, as follows:

I. Purpose

The purpose of this instruction is to provide notice and direction to recipients of Legal Services Corporation funding in meeting the terms of a special condition regarding recipient fund balances to be placed upon 1983 grant awards. The objective is to ensure the timely allocation of Corporation funds for the effective and economical provision of high quality legal assistance to eligible clients. To that end recipients will henceforth be permitted to maintain and reprogram from year to year fund balances of no more than 10% of their Legal Services Corporation funding.

A waiver of this provision to a maximum of 25% may be obtained upon a satisfactory showing of good cause by the recipient. Funds carried over in excess of 10% or the level permitted by a specific waiver will be set-off against the succeeding year's grant award.

. . .

IV. Policy

A. In the absence of a waiver from the Corporation, any fund balance amount in excess of 10% shall be set off against the recipient's annualized grant award for the next period by pro rata deductions from the remaining monthly allocations to the recipient.

. . .

C. In no way shall any such deduction be construed to affect the annualized funding level of such recipient.

STATEMENT OF THE CASE

This Petition arises from a permanent injunction issued by the District Court on October 4, 1983, *nunc pro tunc* September 30, 1983, affirmed with a dissenting opinion by the Court of Appeals on August 28, 1984, enjoining LSC and its employees and agents from withholding any funds awarded to East Arkansas Legal Services (hereafter EALS) for 1983 until the Defendants satisfied the Act and its implementing regulations, 45 C.F.R. Part 1600. LSC had informed EALS that it was going to offset funds in October and November, 1983, pursuant to established corporate policy, because EALS had carried over excess funds from its 1982 grant for the delivery of legal services in Arkansas.

Facts Material To The Consideration Of The Questions Presented

Since its inception, LSC has had a corporate policy on fund balance carryovers by its grantees, and on December 18, 1980, that policy was formalized. That policy required that whenever a program had a fund balance in excess of 10%, it had to submit a plan seeking approval for the expenditure of the fund balance. Exhibit 3 to Defendants' Points and Authorities filed in the District Court (hereafter Def. P&A, Ex. ——).

On March 18, 1982, the fund balance policy of December 18, 1980, was reaffirmed in Memorandum No. 82-14. Def. P&A, Ex. 4. That Memorandum also states that spend down plans "are to be reviewed at refunding time and considered as a factor in that process." *Id.*

During 1982, LSC discovered that $41 million of the $250 million granted to the 326 local programs to deliver legal services to poor people in 1980, had not been expended. In fact, twenty-six of those programs had fund balances in excess of 50% of their grants (one as high as 132%), and another 65 had fund balances between 25% and 50%. Def. P&A, Ex. 6.

A new fund balance policy was discussed at a meeting of the Audit and Appropriations Committee of the LSC Board of Directors on August 27, 1982, including comments by John Sizemore, the Executive Director of EALS. Def. P&A, Ex. 5.

On October 30, 1982, LSC's Board adopted a Resolution which detailed the Corporation's fund balance policy. *Id.* That Resolution provided that a program could maintain a fund balance of up to 10% of its annualized grant, that a program could seek a waiver to retain up to 25% of its annualized grant, and that in 1983 and thereafter all grants would contain a condition that fund balances in excess of 10% or a waived higher amount would be set off against grant payments. Mr. Sizemore also spoke to that Resolution prior to its adoption. *Id.*

LSC published an Instruction for comment in the *Federal Register* embodying the provisions of the October 30, 1982, Resolution in November, 1982, Vol. 47, No. 229, pages 53805 and 53806, and the Board of Directors adopted that policy on December 16, 1982. Minutes of the LSC Board, December 16, 1982.

The grant award to EALS (and all of the other 325 LSC-funded programs) for 1983 funds contained a condition which stated that the recipient program agreed to be bound by a fund balance instruction to be published after the grant was made. EALS accepted that grant condition by signing the grant documents and expending 1983 funds under their terms and conditions.

On January 5, 1983, the final Instruction was published by LSC in the *Federal Register* in the same form as published in November, 1982. Vol. 48, No. 3, pages 560 and 561.

Pursuant to the Corporation's Fund Balance Policy, EALS submitted a request to carry over a fund balance of more than 10% of its annualized funding level. Def. P&A, Ex. 8. At that time, EALS had a fund balance of

$173,841, and the Corporation automatically allowed EALS to carry over an amount of $65,293, *i.e.*, 10% of its annualized funding level plus investment income. Def. P&A, Ex. 2. EALS, however, requested that it be allowed to keep an amount equal to 25% of its annualized funding level plus investment income. Def. P&A, Ex. 8.

On April 22, 1983, Gregg Hartley, the Director of LSC's Office of Field Services, responded to the program's request, granting it in part and denying it in part. Def. P&A, Ex. 9. Mr. Hartley allowed the program to retain an additional $35,000 over the 10% limit, or a total of $100,298. EALS was thus assured of the availability of approximately $705,000 of Legal Services Corporation funds to provide legal services to eligible clients in 1983. Mr. Hartley also advised the program of its right of appeal under the Fund Balance Policy. *Id.*

On May 11, 1983, EALS, through counsel, appealed Mr. Hartley's decision to Dennis Daugherty, the Corporation's Vice-President for Operations. Def. P&A, Ex. 10. After an independent review of the program's request in light of the criteria set out in the Fund Balance Policy, Mr. Daugherty upheld the decision and so notified the program's counsel. Def. P&A, Ex. 11. He further indicated that Gregg Hartley would contact EALS concerning the recovery of its excess fund balance. *Id.*

On August 25, 1983, Mr. Hartley advised EALS that pursuant to the Corporation's policy on excess fund balances, LSC was going to offset $83,543 from EALS's grant, commencing in October, 1983, with monthly deductions of $11,943.71 from its regular grant payments. Complaint, paragraph 9. The total figure was later corrected to $73,543.

EALS filed suit in the District Court on September 23, 1983, alleging jurisdiction solely on the basis of 28 U.S.C. § 1331.

REASONS FOR ALLOWANCE OF THE WRIT

I. The Decision by LSC to Offset a Portion of the 1983 Grant Awarded to EALS Because of a Significant Carryover of Unspent 1982 Grant Funds, Pursuant to Established Corporate Policy and Without a Hearing, Did Not Constitute an Impermissible Termination under LSC's Regulations.

In 1974, Congress established LSC to provide legal assistance in civil matters to those who could not otherwise afford an attorney. The enabling statute, 42 U.S.C. § 2996 *et seq.*, provides that the Corporation shall issue grants and contracts for the purpose of providing legal assistance to eligible clients, 42 U.S.C. § 2996e, and that in doing so, LSC shall "insure that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance . . ." 42 U.S.C. § 2996f.

Funding for the Corporation grew rapidly between 1975 and 1980, and by late 1980, LSC determined that it had to do more to control the excessive amount of its grantees' funds not being spent in the years awarded to provide legal assistance. Accordingly, on December 18, 1980, the Corporation announced guidelines to "formalize and slightly modify the rules and principles which the Corporation . . . has followed since its inception." Def. P&A, Ex. 3. Those guidelines provided that whenever a grantee had a fund balance in excess of 10%, it had to submit a plan to the Corporation for approvel of the expenditure of the fund balance, and that "[t]he plan will be reviewed . . . when the 1982 refunding process begins. Noncompliance with the plan may result in an adjustment of funding for the program."

On March 18, 1982, Clint Lyons, the Director of LSC's Office of Field Services, acknowledged that "the recent fund balance projection review [shows] the problem persists." Def. P&A, Ex. 4. That memorandum required that each program with a projected fund balance in ex-

cess of 10% had to have a current approved plan for the allocation and expenditure of those funds. In addition, a detailed explanation had to be made for all fund balances in excess of 25%, with recoupment being possible for programs with fund balances in excess of 40%. *Id.*

On August 19, 1982, Mr. Lyons notified the Audit and Appropriations Committee of the Board of Directors that 26 field programs had fund balances in excess of 50% which amounted to $10,289,000 of unspent funds for legal assistance. Included in that group was EALS with a fund balance of $550,000. Def. P&A, Ex. 6. Sixty-five other programs had fund balances between 25% and 50%. Altogether, more than $41,000,000, or nearly 17% of the granted funds, constituted fund balances which had not been spent in 1981 to provide legal services to eligible clients.

With this crisis facing the Corporation, the Board of Directors undertook action. A fund balance policy was discussed by the Audit and Appropriations Committee on August 27, 1982, and John Sizemore, Executive Director of EALS, was one of those who addressed the Committee. On October 30, 1982, the full Board adopted a Resolution which detailed the Corporation's Fund Balance Policy. App. p. 40a. That Resolution became the basis for the Instruction which is at issue in this case.

In enjoining the Instruction published on January 5, 1983, the District Court made two findings which formed the basis for its decision. First, the District Court found that despite the Corporation's position that the monthly reduction of a portion of EALS's grant was an offset, that deduction was actually a termination of funding as defined at 45 C.F.R. § 1606.2(a). App. p. 29a. Further, the Court found that the "termination" was improper pursuant to 45 C.F.R. § 1606.4 since it was based upon an instruction not in effect on January 1, 1983, when the current grant became effective. App. p. 30a. The Court of Appeals affirmed those findings.

A comparison of the Purpose section of the Instruction, *supra*, p. 4, with the Resolution on fund balances adopted by the Board of Directors on October 30, 1982, App. p. 40a, shows that the Instruction tracks the Resolution. Because the Director of EALS participated in the discussion at which the Resolution was adopted, EALS had actual knowledge of the Board's policy well before the date on which the Instruction was first published for comment in the *Federal Register*. In fact, EALS stipulated at the hearing that "through its Executive Director [it] had ample notice that the Corporation was intending to change its policies." Transcript, p. 16.

More importantly, the Instruction provides in Section IV.C that a deduction of funds from future grant awards shall not affect the annualized funding level of the recipient, and the annualized funding level is the controlling factor. When Congress passed the Continuing Resolution, Public Law 97-377, on December 20, 1982, appropriating funds for LSC for fiscal year 1983, it provided:

> . . . That notwithstanding any regulation, guideline or rule of the Corporation, the funds appropriated in this Act for the Legal Services Corporation shall be used by the Legal Services Corporation in making grants . . . so as to insure that funding for each current grantee and contractor is maintained in 1983 at the *annualized level* at which each grantee and contractor was funded in 1982. . . . (Emphasis supplied.)

Gregg Hartley, the Director of the Office of Field Services at the time involved, explained that:

> . . . the base of the annualized level is determined by multiplying the number of eligible clients within the recipient's service area by the minimum access figure of $6.20. Def. P&A, Ex. 1.

On March 28, 1983, counsel for EALS wrote LSC's Acting Regional Director for the Atlanta Regional Office

detailing, *inter alia*, EALS's funding history and carryover funds as follows:

Year	Grant Amount	Carryover
1978	$191,000	$130,000
1979	$388,000	$276,000
1980	$606,000	$617,000
1981	$606,000	$550,000
1982	$605,000	$173,000

Def. P&A, Ex. 8. Thus, in 1982, EALS's annualized funding level was $605,000.

"Termination" is defined at 45 C.F.R. § 1606.2(a) as:

> . . . a decision that financial assistance to a recipient will be permanently terminated in whole or in part prior to expiration of the recipient's current grant or contract.

The term "financial assistance" is not defined in either the Act or the Regulations in place at the time involved herein, although it has since been defined by the Board of Directors as "annualized funding from the Corporation granted under 1006(a)(1)(A) for the direct delivery of legal assistance to eligible clients." 45 C.F.R. § 1600.1. For the offset to have been a "termination", EALS's annualized funding level would have had to have been reduced below $605,000. The letter from LSC to counsel for EALS on August 19, 1983, affirming the partial denial of the fund balance waiver request, shows that even with the offset, EALS would have $705,000 available for expenditure in fiscal year 1983, or $100,000 more than its annualized funding level. In addition, the offset cannot be termed a "permanent" reduction since the funding level for fiscal year 1984 for EALS was actually increased, and the procedure for determining the annualized funding level was not changed.

The Courts below also found that the Instruction was not applicable to the grant awarded to EALS since it was

not effective on the date the grant was issued, citing 45 C.F.R. § 1606.4:

> . . . termination shall not be based on a Corporation rule, regulation, guideline, or instruction that was not in effect when the current grant was made . . . .

EALS's 1983 grant was sent to that program on January 4, 1983, and the Instruction was published in the *Federal Register* in final form on January 5, 1983. The effective date of the Instruction was February 4, 1983.

However, the Court of Appeals acknowledged, App. p. 5a, that the Board adopted a resolution on October 30, 1982, which formally established corporate policy, and that the proposed instruction was published in November, 1982. Further, the Courts below ignored one very important fact. In its 1983 grant documents, EALS agreed to and accepted a general grant condition which stated that it would be bound by the fund balance instruction which was to be published later. General grant condition 7 provides:

> Consistent with the Instruction on Recipient Fund Balances *to be published* by the Corporation, unexpended funds in excess of ten percent (10%) of the recipient's 1982 support from the Legal Services Corporation, carried forward as a fund balance at the close of the recipient's 1982 fiscal year shall be set off against this grant award.
>
> A waiver of this provision to a maximum of twenty-five percent (25%) may be sought by application to the appropriate regional office within ninety (90) days of the close of the recipient's fiscal year. (Emphasis supplied.)

As the District Court said in *United States v. Frazer*, 317 F. Supp. 1079, 1083 (M.D. Ala. N.D., 1970):

> . . . The law is also clear that the grant of federal assistance may be made upon conditions *that are attached to the grant* and that the *acceptance by the*

recipient of the grant to which the conditions and stipulations are attached creates an obligation on the part of the recipient to perform the conditions. *United States v. Northern Pacific Ry. Co.*, 256 U.S. 51, 41 S.Ct. 439, 65 L.Ed. 825, and the cases therein cited. On this point the Supreme Court of the United States stated in *McGee v. Mathis*, 4 Wall. 143, 71 U.S. 143, 155, 18 L.Ed. 314:

> It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constituted a contract. All the elements of a contract met in the transaction-competent parties, proper subject-matter, sufficient consideration, and consent of minds. This contract was binding upon the State. * * * (Emphasis in the original.)

See generally, M. Mason, *Federal Grant Law*, 1982

Thus, even assuming, *arguendo*, that the Courts below were correct, by contract the parties agreed to a modification of Regulation § 1606.4, and it, therefore, was not applicable to this situation.

II. Issuance Of The Permanent Injunction Violated The Public Interest.

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, the District Court consolidated the hearing on the preliminary injunction with the decision on the merits.

In order to have been entitled to an injunction under established case law, EALS must have shown that:

1. It was likely to succeed on the merits of the action it brought;
2. It would be irreparably injured if such relief was not granted;
3. The grant of preliminary relief would not substantially harm another's interest; and
4. The public interest would be served by granting the relief.

Washington Metropolitan Area v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

While LSC believes that an injunction was improper under points 1 and 2 above, the primary reason for disallowance is point 4. If the Corporation had been allowed to proceed as described above, it would have withheld a total of approximately $24,000 from the two remaining checks due EALS in 1983. The program would have had at its disposal for the year an approximate total of $705,000, or $100,000 more than its annualized funding level.

Excessive fund balance carryovers had been a problem for LSC since its inception. In 1982, 91 of the 326 grantees had fund balances in excess of 25% of their grant awards, one as high as 132%. This amounted to tens of millions of dollars in excess fund balances beyond the permissible level. Unexpended funds remaining with recipients are funds that are not being used in a timely manner to provide services to eligible persons. At one time, more than $41 million of granted funds were carried forward unspent for legal services for eligible clients.

As is set out in the Affidavit of Gregg Hartley, Def. P&A, Ex. 1, the Corporation planned to reprogram the funds recovered under the Instruction to serve clients. The Corporation's Board directed that recovered funds could be used by programs to provide representation of pending cases for certain alien clients who were barred from receiving services with funds provided under the 1983 Continuing Resolution, and a procedure was established for accepting grant applications and awarding recovered funds to recipients for that purpose. The Corporation also planned to use such recovered funds, to the extent they were available, to supplement the funding of recipients having the lowest per capita base.

Clearly, the public interest was not served by enjoining the implementation of the Fund Balance Instruction and preventing the recovered funds from being immediately put to use to serve eligible clients, *i.e.*, providing the most economical and effective delivery of legal assistance. 42 U.S.C. § 2996f(a)(3).

As Judge Starr correctly notes in dissent in the Court of Appeals, it is inconceivable that Congress would envision a full scale hearing before an independent hearing officer every time the Corporation attempted to recover funds from a recipient. The evidence in this case discloses that 91 programs had fund balances of over 25%. Under the majority's ruling, assuming no problem with the publication date, 91 separate "timely, full, and fair hearings" would have been required.

In addition, read literally, if LSC attempts to recover funds that an audit shows have been illegally expended by a recipient, a hearing would be required.

It simply cannot be in the public interest to have LSC administer a budget of $305,000,000 earmarked by Congress to provide legal services to the poor, and spend millions of dollars on hearings, or, conversely, ignore its fiduciary responsibility and allow funds to be tucked away and not used to serve clients or to be spent illegally.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review and reverse the opinion of the Court of Appeals.

Respectfully submitted,

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APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2118

EAST ARKANSAS LEGAL SERVICES, A CORPORATION

v.

LEGAL SERVICES CORPORATION, *et al.*,
Appellants

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 83-02813)

Argued June 1, 1984

Decided August 28, 1984

D. Clifford Crook, III, with whom *Alan R. Swendiman* was on the brief, for appellants.

Thomas J. Mack of the Bar of the Supreme Court of California *pro hac vice* by special leave of the Court, with whom *Alan Dockterman* was on the brief, for appellee.

Before: MIKVA and STARR, *Circuit Judges*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* MIKVA.

Dissenting opinion filed by *Circuit Judge* STARR.

MIKVA, *Circuit Judge*: Since 1978, appellee East Arkansas Legal Services (EALS) has received annual grants from the Legal Services Corporation (LSC or the Corporation) to provide legal assistance to the poor. In 1983, LSC notified EALS that some of its remaining grant funds for 1983 would be withheld to offset unspent LSC funds which EALS had carried over from prior years. EALS brought this suit against appellants, the Corporation and three of its officials, to enjoin them from withholding any funds until the Corporation granted EALS a hearing pursuant to 42 U.S.C. § 2996j (1976 & Supp. V 1981) and 45 C.F.R. § 1606 (1983). The district court held for EALS and the Corporation appealed. *See East Arkansas Legal Services v. LSC*, Civil Action No. 83-2813 (D.D.C. October 4, 1983). We affirm.

I. BACKGROUND

In 1974, Congress established the Legal Services Corporation as a non-profit corporation to provide legal assistance in civil matters to persons unable to afford adequate legal counsel. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378, 42 U.S.C. §§ 2996 *et seq.* In creating a corporation to administer the legal services program, Congress intended to ensure that the program would be independent and "free from any outside interference, political or otherwise." H.R. REP. NO. 247, 93d Cong., 1st Sess. 3 (1973), *reprinted in* 1974 U.S. CFDE CONG. & AD. NEWS 3874 (1974). Congress considered protection of the Corporation's independence to be a centerpiece of the Legal Services Corporation Act of 1974 (the Act).

The Act authorizes the Corporation to provide financial assistance to individuals, organizations, and state and local governments that provide legal assistance to the poor. 42 U.S.C. § 2996e(a)(1)(A). Pursuant to that authority, the Corporation currently provides annual grants to over 300 legal services programs throughout

the country. The Act also establishes strong procedural protections for grant recipients. Before the Corporation reduces a recipient's grant award in a significant manner—whether through termination or suspension of financial assistance or through a denial of refunding at the end of the grant year—the recipient is entitled to notice and a hearing. *Id.* § 2996j.

For several years, the Corporation did not require the expenditure of grant funds in the year in which the funds were awarded. Under the policy set forth in the Corporation's "Audit and Accounting Guide for Recipients and Auditors", recipients were permitted to carry over unspent funds into subsequent years, although each recipient was required to account separately for this "fund balance" in its annual audit. *See* Memorandum Opinion at 3, 9. Beginning in 1982, however, the Corporation began to develop a new policy designed to limit the amount of unspent funds which grant recipients could carry over into subsequent years. This case involves the Corporation's application of that new fund balance policy to EALS in 1983.

A. *LSC's Development of a New Fund Balance Policy*

Since at least 1980, the Corporation has required every recipient with a fund balance exceeding ten percent of its LSC grant to submit a plan explaining how the recipient intended to spend those funds and over what period of time. In 1982, the Corporation decided to strengthen this policy through an effort to eliminate recipients' excess fund balances. In August, LSC staff prepared a memo for the Committee on Audit and Appropriations of LSC's Board of Directors (the Board), recommending two courses of action. First, the staff suggested that the Corporation take immediate action against any recipients whose fund balances exceeded fifty percent of their current grant. Those programs were to be notified, pursuant to the requirements of 45 C.F.R. § 1623

(1983), that their financial assistance would be suspended for thirty days unless they could show cause why the suspension should not take effect.

Second, the memo recommended that the Board approve a new policy to be applied during the 1983 grant year. Under that policy—which the full Board eventually adopted—recipients would be permitted to carry over only ten percent of their annual LSC grants. With respect to any carryover between ten percent and twenty-five percent of a recipient's annual grant, the Corporation would permit recipients to apply for a waiver of the ten percent ceiling. In no case, however, would a recipient be permitted to carry over anything in excess of twenty-five percent of its annual grant. The Corporation would recover fund balances exceeding the permissible levels by offsetting the recipient's current grant award.

The proposed policy could be enforced only if the Corporation knew the amount of funds actually carried over at the end of a program's fiscal year. Because that determination apparently could not be made prior to the beginning of the subsequent fiscal year, the memo recommended that a condition be included in all future grants, beginning with those for 1983. That condition would indicate that the recipient's new grant award would be offset by the Corporation if the recipient carried over impermissible levels of funds.

The Board's Audit and Appropriations Committee approved the general recommendations contained in the memo and directed the staff to prepare a resolution for Board action on the proposed new fund balance policy. Immediately following the Committee meeting, the Corporation took steps to suspend financial assistance to twenty-two grant recipients, including EALS, with fund balances in excess of fifty percent of their 1982 grants. Both the statute and the regulations require the Corporation to give a recipient reasonable notice and an op-

portunity to show cause why a suspension should not occur. 42 U.S.C. § 2996j(1); 45 C.F.R. § 1623 (1983). (All references to LSC's regulations refer to the regulations in effect in 1983 when the Corporation took the actions challenged in this lawsuit.) Pursuant to these regulations, LSC sent preliminary determination letters to twenty-two recipients notifying them of the proposed suspension. 45 C.F.R. § 1623.4(a). Two of the programs voluntarily returned sufficient funds to bring their fund balances below the fifty percent level. EALS was one of the sixteen programs that successfully challenged the preliminary determination.

Following the Committee meeting, the staff also prepared a resolution for Board consideration that set forth a new "instruction" regarding the Corporation's fund balance policy. (Instructions are policy guidelines adopted by the Corporation that are not codified in the Code of Federal Regulations.) The Board adopted the resolution on October 30, 1982, and, in November, a notice of the proposed new Fund Balance Instruction (the Instruction) was published in the Federal Register. 47 Fed. Reg. 53,805 (1982). Following a comment period, the Board, at its December 1982 meeting, adopted the new fund balance policy, directed the staff to publish the final Instruction in the Federal Register, and approved a condition to be included in all 1983 grant contracts incorporating the provisions of the new policy. The Instruction was published in the Federal Register on January 6, 1983, and, pursuant to a statutory requirement that all rules, regulations, guidelines, and instructions be published thirty days prior to their effective date, the Instruction went into effect on February 5, 1983. *See* 42 U.S.C. § 2996g(e).

The Instruction required recipients to provide LSC with a statement of their fund balances from 1982 within ninety days after the close of the fiscal year. If a recipient's fund balance exceeded ten percent of its 1982 grant, it was permitted to apply within that same ninety-day pe-

riod for a waiver of the ten percent ceiling so that it could retain up to twenty-five percent of its 1982 grant. The initial waiver decision was to be made by the Regional Office, but the Instruction permitted recipients to appeal the decision of the Regional Office to the Director of Field Services, whose determinations would be final. The Instruction provided that, "[i]n the absence of a waiver . . . any fund balance amount in excess of 10% shall be set off against the recipient's annualized grant award for the next period by pro rata deductions from the remaining monthly allocations to the recipient." *Id.* The Instruction also provided that recipients would receive notice at least thirty days prior to any deduction in their monthly allocations. The Corporation began implementation of this new policy in early 1983.

The Corporation awarded its 1983 grants before the Instruction went into effect, but included a special condition in all grant awards regarding the newly adopted fund balance policy. That condition provided:

> Consistent with the Instruction on Recipient Fund Balances *to be published by the Corporation*, unexpended funds in excess of 10% of the recipient's 1982 support from the Legal Services Corporation, carried forward as a fund balance at the close of the recipient's 1982 fiscal year shall be set off against this grant award.
>
> A waiver of this provision to a maximum of 25% may be sought by application to the appropriate Regional Office within 90 days of the close of the recipient's fiscal year.

48 Fed. Reg. 561 (1983) (emphasis added).

B. *Application of the New Fund Balance Policy to EALS*

EALS received its first grant of $191,000 from LSC in 1978. Although EALS carried over a significant amount of funds that year, the Corporation doubled

EALS' grant in 1979 and increased it again in 1980. From 1980 until 1983, EALS received between $605,000 and $606,000 in new grant funds each year from the Corporation.

At the end of 1982, Congress approved a Continuing Resolution appropriating money to the Corporation and other agencies for fiscal year 1983. Joint Resolution of December 21, 1982, Pub. L. 97-377, 96 Stat. 1830. The Continuing Resolution required the Corporation to provide the same level of funding to grantees that it had provided them in 1982:

> [N]otwithstanding any regulation, guideline, or rule of the Corporation, the funds appropriated in this Act for the Legal Services Corporation shall be used by the Corporation in making grants or entering into contracts . . . *so as to insure that funding for each such current grantee and contractor is maintained in 1983 at the annualized level at which each such grantee and contractor was funded in 1982*, or in the same proportion which total appropriations to the Corporation in fiscal year 1983 bear to the total appropriations to the Corporation in fiscal year 1982, until action is taken by directors of the Corporation who have been confirmed in accordance with . . . the Legal Services Corporation Act.

96 Stat. 1876 (emphasis added). Consistent with that resolution, EALS, which had received $605,000 from the Corporation in 1982, was awarded a grant of $605,274 for fiscal year 1983. (Although the Corporation's fiscal year runs from October 1 to September 30, the fiscal year for all of the Corporation's grant recipients runs from January 1 to December 31.) The Corporation pays out annual grant awards in eleven monthly installments. The first installment, provided in late December, provides two-twelfths of a recipient's total annual grant. The remaining installments are paid in one-twelfth increments at the beginning of each month from February to Novem-

ber. Consistent with that scheme, EALS' 1983 grant was disbursed in monthly installments of $50,522.

EALS' financial statement for fiscal year 1982 indicated that it had a fund balance of $173,841 as of December 31, 1982. Under the Instruction, EALS was entitled automatically to keep $65,298 of that fund balance, an amount equal to ten percent of EALS' 1982 annual grant plus investment income. In March 1983, pursuant to the Instruction, EALS applied for a waiver of the fund balance policy up to the full allowable amount of twenty-five percent. In its letter to the Corporation, EALS stated that its request for a waiver of the fund balance policy "does not constitute a waiver by said recipient of any claims it may have respecting the enforceability of the referenced instruction, the grant condition referred to therein, or the recapture policy generally." Defendants' Memorandum of Points and Authorities, Exhibit 8.

The Corporation granted EALS a waiver for $35,000 which was attributable to a one-time special needs grant, but it denied the rest of EALS' request. Pursuant to the Instruction, EALS appealed that decision. In an August 19, 1983, letter denying that appeal, EALS was told that it would have a total of $750,000 available to it in 1983: the $605,000 grant; the $65,000 carryover automatically permitted under the Instruction; and the $35,000 attributable to the special needs grant.

One week later, on August 25, 1983, LSC notified EALS that it intended to offset $83,543 of EALS' excess fund balance against EALS' 1983 grant award over a several month period. (The Corporation subsequently corrected its determination to $73,543—the amount of the fund balance which EALS was not permitted to carry over into 1983.) The letter to EALS (hereinafter referred to as the "offset notice") indicated that the amount to be offset would be deducted on a pro rata basis from EALS' monthly grant allocations beginning in October

1983, at the rate of $11,934 per month. The deduction amounted to approximately twenty-five percent of EALS' two remaining monthly grant allocations for 1983. EALS here challenges only the proposed reductions in those two 1983 monthly allocations.

Several days after receiving the offset notice, EALS responded with a request for a hearing pursuant to the Corporation's "Procedures Governing Termination of Financial Assistance and Denial of Refunding" set forth at 45 C.F.R. § 1606. In contrast to the Corporation's notice to EALS in 1982 regarding the proposed thirty-day suspension of financial assistance, the Corporation's offset notice did not suggest that the announced deductions constituted a "preliminary determination" triggering EALS' right to a hearing. EALS, however, treated the offset notice as a preliminary determination that its financial assistance from the Corporation was about to be terminated in part. It therefore requested an "informal conference" pursuant to 45 C.F.R. § 1606.6. On September 19, 1983, the Corporation denied EALS' request for a hearing on the ground that the offset did not constitute a "termination" of financial assistance within the meaning of the regulations. This lawsuit followed.

C. *Proceedings before the District Court*

On September 23, 1983, EALS filed a complaint seeking declaratory and injunctive relief to prevent the Corporation and three of its officials from withholding funds from EALS' remaining 1983 grant allocations until the Corporation complied with the notice and hearing requirements of the Act and its implementing regulations. EALS also filed motions for a temporary restraining order (TRO) and a preliminary injunction. Following a hearing on September 23, the district court granted EALS' motion for a TRO. At a second hearing on September 30, 1983, the district court, with the consent of the parties, consolidated the motion for a preliminary

injunction with a hearing on the merits of EALS' underlying claims. *See* FED. R. CIV. P. 65. The district judge granted EALS' request for preliminary and permanent injunctive relief.

The court held that the Corporation's proposed withholding of funds constituted a "termination" within the meaning of 45 C.F.R. § 1606.2(a) (1983). It therefore found that EALS was entitled to a hearing pursuant to 42 U.S.C. § 2996j(2). The court further found that 45 C.F.R. § 1606.4 prohibits the Corporation from terminating a recipient's grant award on the basis of a policy that was not in effect at the time the grant was made. Because the Fund Balance Instruction did not take effect until after the Corporation had awarded EALS its 1983 grant, the court concluded that section 1606.4 precluded the Corporation from relying on the Instruction when it sought to reduce EALS' remaining monthly grant allotments for 1983. The Corporation and the three individual defendants noticed an appeal. They also filed a motion for summary reversal, which this court denied.

II. ANALYSIS

The Corporation offers two grounds for reversing the district court. First, it contends that the proposed offset of funds did not constitute a "termination" within the meaning of the regulations and that, therefore, EALS was not entitled to a hearing. Second, it argues that, regardless of whether the offset can be characterized as a termination, EALS agreed to abide by the policies set forth in the as-of-yet unpublished Instruction, and was bound by that agreement. We reject both contentions.

A. *LSC's proposed reduction in funds was a "termination."*

Congress directed the LSC to develop procedures for insuring that financial assistance to a recipient would not be terminated absent adequate notice and an opportunity for a hearing. The statute provides:

> [F]inancial assistance . . . shall not be terminated, an application for refunding shall not be denied, and a suspension of financial assistance shall not be continued for longer than thirty days, unless the grantee . . . has been afforded reasonable notice and opportunity for a timely, full, and fair hearing, and, when requested, such hearing shall be conducted by an independent hearing examiner. *Such hearing shall be held prior to any final decision by the Corporation to terminate financial assistance or suspend or deny funding.*

42 U.S.C. § 2996j(2) (emphasis added). The LSC's procedures governing the termination of financial assistance and denial of refunding are found at 45 C.F.R. § 1606. Those regulations define a "termination" as "a decision that financial assistance to a recipient will be permanently terminated *in whole or in part* prior to expiration of the recipients' current grant or contract." 45 C.F.R. § 1606.2(a) (emphasis added). A denial of refunding is a decision by LSC to refuse to refund a recipient or to reduce substantially the amount of the recipient's refunding at the end of a grant year. Under LSC's regulations, any reduction in a recipient's grant that is more than ten percent or more than $20,000 below the recipient's previous grant constitutes a "denial of refunding" that triggers the hearing requirement. *Id.* § 1606.2(b)(2). Thus any significant reduction in a recipient's funding—whether by termination, suspension or denial of refunding—is subject to the notice and hearing requirements of the Act.

LSC contends here that a termination of financial assistance occurs only when a recipient's "annualized level of funding" is reduced prior to the expiration of a grant. That term does not appear in the Act or the regulations. LSC's brief defines a recipient's "annualized level of funding" as those funds which LSC insures will be *available* to a recipient during the fiscal year. In EALS' case,

the Corporation established an "annualized funding level" for 1983 at $605,247. Because LSC permitted EALS to carry over $100,000 in excess LSC funds provided in prior years, and only sought to offset $73,000 in carryover funds, EALS had $705,000 in LSC funds *available* to it in 1983. Because EALS would still have over $605,000 in LSC funds available to it in 1983, LSC claims that its decision to recover approximately $24,000 in excess carryover funds by offsetting EALS' two remaining 1983 grant allotments did not constitute a "termination" of EALS' financial assistance in 1983.

EALS counters that the term "financial assistance" in the statute and the regulations refers to the money that LSC agrees to pay to a recipient during a fiscal year. Thus, under EALS' interpretation, a termination occurs when the grant award promised to a recipient during a fiscal year is reduced. The fact that LSC has permitted recipients to carry over funding from prior years should not diminish the Corporation's obligations under the current year's contract.

We agree with EALS' interpretation of the meaning of the word "termination." "[U]nless contrary indications are present, a court can assume that Congress intended the common usage of [statutory terms] to apply." *Inner City Broadcasting v. Sanders*, 733 F.2d 154, 158 (D.C. Cir. 1984). Here, the statute refers to the termination of a recipient's "financial assistance," not, as the Corporation would suggest, to the reduction in a recipient's "annualized level of funding." The use of the term "financial assistance" in the statute and the regulations indicates that the term refers to the amount of money actually paid to a recipient pursuant to a grant award, not to the amount of funds available to a recipient during a grant year.

The plain meaning of the language authorizing the Corporation to enter into agreements "to provide financial assistance to qualified programs" is that the Corporation

has authority to pay out money to a recipient, not to ensure that money is *available* to that recipient from some other sources, including a *different* grant. *See* 31 U.S.C. § 6304 (1982) (defining a "grant agreement" as "the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—(1) the principal purpose of the relationship is *to transfer a thing of value* to the . . . recipient to carry out a public purpose of support or stimulation authorized by a law of the United States") (emphasis added). Although the statute does not define the term "financial assistance," it authorizes LSC to provide such assistance by contract or grant. *See* 42 U.S.C. § 2996a(6); § 2996e(a)(1)(A). Thus the grant awards, which LSC provides annually and pays out in monthly allotments, are the measure of "financial assistance" which LSC provides to a recipient.

LSC's regulations also suggest that "financial assistance" refers to the money paid out to a recipient, not to the level of funding available to a recipient. Nowhere do the regulations refer to the *availability* of funds as a measure of a recipient's financial assistance. The provisions of the regulations providing for notice and a hearing when "financial assistance" is suspended or terminated are framed in reference to a recipient's "current grant." 45 C.F.R. §§ 1606.2(a), 1623.2.

LSC's own conduct in 1982, when it proposed to suspend financial assistance to twenty-two grant recipients, is consistent with a finding that "financial assistance" in both the statute and the regulations refers to the amount of money paid out to a recipient. The Act mandates two distinct notice and hearing procedures for two different situations. In the first situation, where LSC intends to suspend financial assistance, a recipient is entitled to a hearing and an opportunity to show cause why the suspension should not take place. 42 U.S.C. § 2996j(1). In the second situation, where LSC intends

to terminate financial assistance, deny refunding, or suspend financial assistance for more than thirty days, the procedures are more elaborate and the recipient is entitled to a full and fair hearing before an independent examiner. *Id.* § 2996j(2). The two procedures are similar, however, in that they both refer, in identical language, to reductions in "financial assistance." Similarly, LSC's regulations implementing these two provisions of the Act contain parallel language concerning the effect of LSC's actions on a recipient's "financial assistance . . . prior to the expiration of the recipient's current grant . . . ." 45 U.S.C. §§ 1606.2(a), 1623.2.

In 1982, LSC adhered to the more limited notice and hearing requirements of the statute and its own regulations when it proposed to suspend, for thirty days, the grant awards of recipients whose fund balances exceeded fifty percent of their current funding levels. That action is significant because it suggests that LSC considered that the term "financial assistance," in both the statute and in LSC's implementing regulations, refers to the amount of funds paid in the current year, not to the level of LSC funds *available* to a recipient in a given year. If LSC's interpretation of what it means to "terminate financial assistance" is correct, then it never would have had to provide notice and a hearing to those twenty-two recipients in 1982 for a proposed thirty-day "suspension of financial assistance." Those recipients carried over an amount of funds exceeding fifty percent of their 1982 awards; a suspension of one-twelfth of their 1982 awards would still have left them with *available* funds far exceeding the amount of their 1982 awards. If the proposed offset in this case was not a "termination" then, under LSC's theory, its proposed curtailment of twenty-two recipients' monthly allotments in 1982 were not "suspensions" either.

We think that LSC properly concluded in 1982, as it should have with regard to the offset proposed against

EALS in 1983, that suspension or termination of "financial assistance" refers to the amount of funding *provided a recipient in the current fiscal year*, not the amount of funding *available* to a recipient in the current fiscal year. Although the equities may have appeared to LSC to be different in those two situations—an unannounced thirty-day suspension of funding as compared to a deliberate move over several months toward a short-term twenty-five percent reduction in funding—the statute and LSC's own regulations, not LSC's present view of the equities, determine the procedures to be followed in both instances.

We also find that adoption of LSC's view of what constitutes "financial assistance" would seriously undermine the procedural safeguards which Congress established for LSC grant recipients. Congress has given LSC explicit authority to terminate financial assistance to any recipient that fails to comply with the many statutory requirements of the Act and with any rules, regulations and guidelines promulgated by LSC under the Act. *Id.* § 2996e(b)(1)(A). Congress made clear, however, that no such termination could occur until a recipient receives an opportunity for a "timely, full, and fair hearing." *See id.* §§ 2996e(b)(1)(A), 2996j(2). The notice-and-hearing requirement applies not only to terminations, but to any significant reduction in a recipient's funding, whether made during or at the end of the grant year. Thus whenever LSC decides to terminate assistance, deny refunding, or suspend assistance for more than thirty days, recipients have a right to a hearing and may demand that the hearing be held before an independent examiner. 42 U.S.C. § 2996j(2).

In most cases, Congress has been silent on the question of a grantee's procedural rights when an agency decides to terminate some or all of its federal grant. *See* R. CAPPALLI, RIGHTS AND REMEDIES UNDER FEDERAL GRANTS 272 (1979). The panoply of due process rights established by Congress under the Legal Services Corporation

Act distinguishes that statute from most other federal grant programs, yet LSC, through a semantic sleight-of-hand, would end-run the clear procedural protections which Congress provided LSC grant recipients. By characterizing EALS' 1983 grant award as a guarantee of an available pool of funds rather than as a commitment to provide new funds, LSC seeks to circumvent the hearing requirements mandated by Congress. Labelling its action a "recovery of prior assistance" does not alter LSC's obligation to provide EALS with a hearing that comports with the requirements of 42 U.S.C. § 2996j.

Any other conclusion would result in a circumvention of the due process rights which Congress bestowed upon LSC grant recipients. Under LSC's annualized level of funding theory, LSC could have decided to "recover" all $173,000 in carryover funds from 1982 in a lump sum without any notice or opportunity for a hearing and *regardless* of the effect that action might have had on the continuing operations of EALS and on the services provided to its clients. Such a result is contrary to the carefully drawn scheme of procedural rights created by the Congress to ensure that programs are not precipitously deprived of funding by LSC.

When it first created the Legal Services Corporation in 1974, Congress wanted to ensure that LSC and its grantees would be independent and free from outside interference. The notice and hearing requirements of the statute were one part of that scheme. In 1977, Congress strengthened the notice and hearing provisions to ensure that the hearing would be held, upon request, before an independent hearing examiner. Pub. L. 95-222, 91 Stat. 1619, 1624 (1977). The legislative history indicates that Congress intended that an independent examiner be available to a recipient "threatened with loss of funding." H.R. REP. NO. 310, 95th Cong., 1st Sess. 15 (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4517. The House Report explained: "The provision will help

to implement the statutory purpose of insulating Corporation decisions from political pressure, *and will insure that the final decision made by LSC will not be reached hastily, or on the basis of erroneous or incomplete information.*" *Id.* (emphasis added).

Congressional concern that legal services programs not experience sudden funding losses is further evidenced by the continuing resolution that required LSC to maintain the same level of funding in 1983 that it had provided recipients in 1982. Similar provisions have appeared in subsequent continuing resolutions, Pub. L. 98-107, 97 Stat. 733, 739 (1983); Pub. L. 98-151, 97 Stat. 964, 973 (1983), and in the FY 1984 Appropriations Act for the Departments of Commerce, Justice, State, the Judiciary and Related Agencies, Pub. L. 98-166, 97 Stat. 1071, 1088 (1983).

LSC made much of the fact that its offset decision was *not* reached hastily, and that EALS was on notice that LSC intended to implement the fund balance policy and even availed itself of the opportunity to seek a waiver of that policy in the spring of 1983. But the notice which EALS received and the waiver procedures it invoked did not comport with the hearing requirements *mandated by statute* and by LSC's own regulations.

At the end of 1982, LSC agreed by contract to provide EALS with $605,000 in financial assistance in fiscal year 1983 monthly allotments of $50,000. We hold that LSC's decision to reduce two of those allotments constituted a permanent "termination" of a portion of EALS' financial assistance in 1983, triggering the notice and hearing requirements of 42 U.S.C. § 2996j and its implementing regulations.

B. *Waiver of the Right to a Hearing*

On appeal, LSC argues that, even if the proposed offset was a "termination," EALS waived its right to a

hearing under the statute and regulations because it accepted a condition in its 1983 grant whereby it agreed to be bound by the new fund balance policy. We need not reach the question of whether LSC may impose a grant condition on its recipients that requires them to waive procedural rights guaranteed by LSC's enabling statute and implementing regulations, for LSC did not raise that argument before the district court.

EALS' 1983 grant agreement was never made part of the record before the district court. The content of the grant condition was determined solely by reference to the published Instruction. Although LSC repeatedly referred to the grant condition in the proceedings before the district court, it did so in the context of asserting that EALS was on notice that its 1983 grant award might be offset pursuant to the new fund balance policy. In particular, LSC, in the context of opposing EALS' motions for a temporary restraining order and preliminary injunction, was trying to show that any "irreparable harm" to EALS was caused by its own failure to plan for the anticipated application of the new fund balance policy.

Furthermore, LSC's counsel indicated at both hearings that the sole issue before the district court was whether the offset was a "termination." LSC raises the waiver argument on appeal to counter EALS' claim that the proposed offset violated a provision of LSC's regulations that prohibits LSC from terminating a contract or grant based upon a policy that was not in effect when the grant was awarded. 45 C.F.R. § 1606.4. LSC's counsel in the proceedings below conceded that, if the offset were a "termination," then section 1606.4 would preclude LSC from withholding the funds. At the hearing on the motion for a temporary restraining order, LSC's counsel stated: "If you were to rule that this action was a termination of funding, then it would be the case that we could not terminate their funds based on a policy

that we had enacted during the calendar year." Transcript of Hearing of September 23, 1983, at 34. According to counsel, the timing of the publication of the new Instruction was not relevant, because LSC contended that no termination had occurred. At the hearing on the preliminary and permanent injunction, LSC's attorney repeated this assertion: "[P]laintiffs are correct that our regulation prevents LSC from terminating a program on the basis of a policy that was not in effect at the time the grant was awarded." Transcript of Hearing of September 30, 1983, at 27-28. We find that the only question presented to and considered by the district court was whether LSC's proposed action with respect to EALS' two remaining 1983 grant allotments constituted a "termination" within the meaning of the statute and regulations. The waiver issue was not presented properly to the district court as an alternative argument and we refuse to consider it now.

CONCLUSION

Although EALS sought to have LSC enjoined from withholding funds only until EALS received a hearing, it is doubtful that a hearing could serve any purpose here, for the sole basis for LSC's proposed offset was the Fund Balance Instruction that did not take effect until after EALS received its 1983 grant award. Accordingly, we affirm the judgment of the district court; LSC was required to comply with the requirements of 45 C.F.R. § 1606 before it could reduce EALS' 1983 grant allotments.

It is so ordered.

STARR, *Circuit Judge, dissenting*: I respectfully dissent. The majority's decision unnecessarily requires the Legal Services Corporation (LSC) to provide East Arkansas Legal Services (EALS) with a hearing under 42 U.S.C. § 2996j (1976 & Supp. V 1981) and 45 C.F.R. § 1606 (1983) prior to withholding a portion of EALS' fiscal year 1983 (FY 1983) funds in order to offset unexpended funds carried over from FY 1982. In my view, the LSC's attempted offset of unspent carried over funds does not constitute a "termination" of "financial assistance" within the meaning of the applicable statute and regulations. Thus, I would hold that LSC was not required to provide EALS with a pre-termination hearing prior to effecting the offset.

Section 2996j(2) provides that

> The Corporation shall prescribe procedures to ensure that—(2) financial assistance under this subchapter shall not be terminated, an application for refunding shall not be denied, and a suspension of financial assistance shall not be continued for longer than thirty days, unless the grantee, contractor or person receiving financial assistance under this subchapter has been afforded a reasonable notice and opportunity for a timely, full, and fair hearing, and when requested, such hearing shall be conducted by an independent hearing examiner. Such hearing shall be held prior to any decision by the Corporation to terminate financial assistance or suspend or deny funding.

The procedures implementing this provision are found in 45 C.F.R. § 1606 (1983). The regulations specify a rather elaborate pre-termination notice and hearing procedure,[1] which is triggered by three specific types of ac-

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[1] The regulations provide for notification of the Corporation's "preliminary determination" that the grant should be terminated or refunding should be denied to the recipient, 45 C.F.R. § 1606.5;

tions affecting the level of funding of an LSC grantee—termination, suspension, or denial of refunding. The regulations define "termination," the funding action relevant to this case, as "a decision that financial assistance to a recipient will be permanently terminated in whole or in part prior to expiration of the recipient's grant or contact." *Id.* § 1606.2(a).[2]

As the majority recognizes, neither the statute nor the regulations define the term "financial assistance." The majority nonetheless concludes that termination of financial assistance includes termination of "the amount of money actually paid to a recipient pursuant to a grant award, not [] the amount of funds available to a recipient during a grant year." Majority Opinion at 14. The majority reaches this conclusion by arguing that the "common usage" of the term "financial assistance" requires this construction. The majority further argues

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for an informal conference procedure at the request of the recipient, *id.* § 1606.6; and for a fact-finding hearing procedure to be conducted by an independent presiding officer. *Id.* §§ 1606.7-.8. The regulations further specify that the Corporation has the burden of proof by a preponderance of the evidence on issues of fact, *id.* § 1606.11(a), and that the Corporation has the obligation of proving a "substantial basis" for its actions. *Id.* § 1606.11(b). After the hearing and any briefing of issues, the presiding officer issues a recommended decision, which is, in turn, reviewable by the President of LSC. *Id.* §§ 1606.13-.14.

[2] The decision to terminate current funding may be based on several criteria. These criteria permit termination or denial of refunding (1) when the denial or termination is "required by or will implement a provision of law, a Corporation rule, regulation, guideline or instruction, . . . or a funding policy, standard, or criterion approved by the Board"; (2) when the recipient has substantially failed to comply with a provision of law, rule, regulation, or guideline; and (3) when "there has been substantial failure . . . to use [] resources to provide economical and effective legal assistance." Funding may not be terminated during the current grant period on the basis of a rule, regulation, guideline or instruction "that was not in effect when the current grant was made or when the current contract was entered into." *Id.* § 1606.4.

that the "plain meaning" of the statutory provisions governing the LSC grantmaking process and the termination regulations support its interpretation.

Critically, the majority arrives at this "common sense" interpretation of these straightforward words only by overlooking the significance of the basic fact that grant awards to legal services providers are made on an *annual* basis and are calculated by means of a "minimum access figure."[3] Contrary to the majority's suggestion, the annual basis on which grants are awarded supports the LSC's argument that *a termination requires, at a minimum, a reduction of the annual funding level.* The annual basis of the funding of LSC grantees also suggests that termination, under the statute and regulations, does not refer to the recapture of *excess* surplus. Consistent with this interpretation of the statute and regulations, the offset attempted here in no way purports to cut off permanently EALS' financial assistance, in whole or in part. Rather, EALS' FY83 funding is to be continued at its annualized rate. Indeed, there is no contention, nor could there be, that EALS' funds are being reduced below this normal level. The offset attempted here is intended only to recover unexpended FY82 funds carried over into FY83.

Moreover, the structure and express language of the regulations supports the view that "termination" does not occur when LSC attempts to recoup unspent funds. In particular, the regulations governing denials of refunding, contrary to the majority's assertion that the regulations do not mention "annual level" of funding, expressly refer to the annualized funding level. A denial of refunding parallels a termination of funding, except that a termination is effective at the time of the current grant, whereas a denial of refunding affects only

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[3] In EALS' case, this figure is $6.20. Thus, the annualized funding level for EALS for FY83 was $605,274.

future grants. 45 C.F.R. § 1606.2(a), (b). Thus, an examination of the criteria for "denial of refunding" is helpful in understanding the type of funding action encompassed by a "termination." The regulations state that a "denial of refunding" occurs when the recipient (1) "[w]ill not be provided with financial assistance"; (2) "[w]ill have its *annual level of financial support reduced to an extent*" that does not result from an overall reduction of LSC funding to legal services agencies and that is more than 10% or $20,000 below the recipient's *current level of assistance*; and (3) "[w]ill be provided with financial assistance subject to a new condition or restriction not generally applicable in other legal services agencies. *Id.* § 1606.2(b) (emphasis added). "Termination," by analogy, encompasses only reductions in the annual level of funding. Since there has been no reduction in the annual level of EALS' annual funding, no termination has occurred.

Neither the statute nor the regulations purport to require an elaborate hearing for every LSC action regarding funding. Rather, the statute and regulations require a hearing only for terminations, suspensions, and denials of refunding. The application of termination embraced by the majority would drain the term of all meaning. If an offset such as that attempted here requires a hearing, then it is difficult to see how an erroneous overpayment, for example, could be recovered without a hearing. In sum, the broad definition of termination adopted here would trigger the hearing procedure for each and every funding decision, an anomalous result compelled neither by the statute nor regulations.

Finally, it should not go unnoticed that the instant case is but a small portion of a much larger drama. Over the past few years, LSC has been engaged in an effort to remedy what appears to be a vexatious problem with excess fund balances being held by various LSC grantees. *See* Appellant's Brief 7-10. Pursuant to its grantmaking

authority under the Legal Services Corporation Act, 42 U.S.C. § 2996f, LSC is to "insure that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance." As early as 1980, LSC developed guidelines aimed at limiting and controlling the amount of unspent, excess funds being retained by LSC providers. Despite that initial effort, the problem has apparently remained, and LSC, in 1982, ultimately developed the Fund Balance Instruction at issue in this case. The majority's decision, requiring as it does a hearing prior to recoupment of those excess, unspent funds, defeats the statutory prescription for the "economical and effective" legal services to the poor. That provision indicates Congress' clear intent that funds be utilized, not simply held, by legal services providers. Thus, the majority's requirement of a hearing prior to implementation of the recoupment of excess funds, rather than serving the noble goal of providing the needy with legal services, frustrates that goal.

In sum, nothing in the statute nor the regulations compels the majority's conclusion. The offset attempted here did not rise to the level of a termination of financial assistance, and thus no hearing was required prior to its implementation. I therefore dissent.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-2813

EAST ARKANSAS LEGAL SERVICES,
Plaintiff

v.

LEGAL SERVICES CORPORATION, *et al.*,
Defendants

[Filed Oct. 4, 1983]

MEMORANDUM OPINION

On September 23, 1983, plaintiff East Arkansas Legal Services ("EALS") filed this action, seeking a declaratory judgment and injunctive relief. EALS also filed a motion for a temporary restraining order and preliminary injunction. Plaintiff seeks to enjoin defendants Legal Services Corporation ("LSC" or "Corporation"), Donald Bogart, Dennis Dougherty, and Greg Hartley from withholding any funds awarded or to be awarded to plaintiff without first complying with the provisions of 42 U.S.C. § 2996j and its implementing regulations, 45 C.F.R. §§ 1606.5-1606.6 (1982). On September 23, 1983, the Court granted plaintiff's motion for a temporary restraining order. On September 30, 1983, the Court heard oral argument on plaintiff's motion for preliminary injunction, as well as testimony from John Sizemore, the Executive Director of EALS. Prior to oral argument, the parties agreed to consolidate this action on the merits.

For the reasons stated below, the Court finds that plaintiff is entitled to judgment on the merits. Defendants are hereby enjoined from withholding funds awarded to plaintiff until LSC has satisfied the provisions of 42 U.S.C. § 2996j and its implementing regulations, 45 C.F.R. §§ 1606.5-1606.6 (1982) as well as 45 C.F.R. § 1606.4 (1982).

I.

Plaintiff East Arkansas Legal Services ("EALS") is a private non-profit corporation organized under the laws of the State of Arkansas. It provides legal services to the poor in a seven-county area in rural eastern Arkansas. Defendant LSC is a non-profit District of Columbia corporation created by Act of Congress, Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378, 42 U.S.C. §§ 2996 *et seq.* It makes grants and enters into contracts with over 300 legal services programs, including EALS. 42 U.S.C. § 2996e(a)(1). Defendants Donald Bogart, Dennis Dougherty, and Greg Hartley are the President, Vice-President, and Director of the Office of Field Services, respectively, of LSC.

At the present time, LSC provides "annualized funding" to 326 programs in the United States. A program's "annualized funding level" is the amount of money LSC agrees to provide to that program on a continuing year-to-year basis. Annualized funds not expended during the grant year are carried forward as a "fund balance" and must be separately accounted for in the recipient's annual audit. *See* Affidavit of Daniel Nusbaum, Exhibit 2 attached to Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a Preliminary Injunction ("Defendants' Opposition").

The fiscal year 1983 grant award to EALS was $605,274. LSC thereby committed itself to making this amount available to plaintiff in 1983. Each month from January to September 1983, EALS received a monthly distribution of $50,522.

By letter dated August 25, 1983, defendant Hartley advised EALS that:

> Pursuant to the Corporation policy on excess fund balances adopted by the Board of Directors in 1982 and the Instruction on Recipient Fund Balances effective February 4, 1983 a determination has been made by the Corporation to recover funds from your program. The amount to be set off is $83,543.00.[1]

Exhibit 1 attached to Complaint (footnote added). The letter also advised EALS that beginning in October 1983, the $83,543.00 would be "set off against your program's annualized grant" by monthly pro rata deductions of $11,934.71. *Id.*

By letter dated August 30, 1983, EALS requested an informal conference pursuant to 45 C.F.R. §§ 1606.5-1606.6 (1982). Exhibit 2 attached to Complaint. On September 16, 1983, plaintiff's attorney spoke with LSC's Deputy General Counsel to determine the status of plaintiff's request. LSC's Deputy General Counsel indicated that plaintiff's request was under review. On September 19, 1983, plaintiff's attorney again contacted LSC's attorney and was informed that LSC was denying EALS' request for an informal conference. Affidavit of Mario Lewis, Exhibit 3 attached to Complaint.

Consequently, on September 23, 1983, plaintiff filed the instant action for a declaratory judgment and injunctive relief.

II.

Plaintiff contends that because defendants' proposed monthly withholding of $11,934.71 constitutes a termination, plaintiff is entitled to reasonable notice and a hearing prior to any final decision pursuant to 42 U.S.C. § 2996j. Defendants argue, however, that this action does

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[1] The amount of EALS' excess fund balance to be recovered has been revised to $73,543.00. Defendants' Opposition at 8 n.2.

not constitute a termination of funding "[b]ecause the Corporation's proposed action in this case will not reduce Corporation funds available to EALS in 1983 below its annualized funding level . . . ." Defendants' Opposition at 11.

At the outset, the Court must determine whether defendants' proposed action constitutes a "termination," as defined at 45 C.F.R. § 1606.2(a). Section 1606.2(a) states that:

> "Termination" means a decision that financial assistance to a recipient will be permanently terminated in whole or in part prior to expiration of the recipient's current grant or contract.

Plaintiff argues that its grant will be permanently terminated in part prior to expiration of its current contract if defendants' proposal to deduct $11,934.71 per month beginning in October 1983 is put into effect. Defendants contend, however, that the proposed monthly withholding of $11,934.71 is an offset against plaintiff's excess fund balance rather than a termination. Despite defendants' characterization of this monthly deduction as an offset, the Court finds that this deduction constitutes a termination.

EALS was awarded a grant of $605,274 for fiscal year 1983, payable in equal monthly installments. As indicated in Part I, *supra*, plaintiff received a monthly allotment of $50,522 from January to September 1983. EALS computed its budget for fiscal year 1983 based on this grant award. Defendants' decision to deduct $11,934.71 per month from plaintiff's grant beginning in October 1983 will have the effect of permanently terminating a portion of the financial assistance awarded to plaintiff for fiscal year 1983. Therefore, plaintiff is entitled to reasonable notice and opportunity for a hearing prior to any final decision by LSC to terminate this financial assistance. 42 U.S.C. § 2996j. Section 2996j states in pertinent part:

> The Corporation shall prescribe procedures to insure that—
>
> • • • •
>
> (2) financial assistance under this subchapter shall not be terminated, an application for refunding shall not be denied, and a suspension of financial assistance shall not be continued for longer than thirty days, unless the grantee, contractor, or person or entity receiving financial assistance under this subchapter has been afforded reasonable notice and opportunity for a timely, full and fair hearing, and, when requested, such hearing shall be conducted by an independent hearing examiner. *Such hearing shall be held prior to any final decision by the Corporation to terminate financial assistance or suspend or deny funding.* Hearing examiners shall be appointed by the Corporation in accordance with procedures established in regulations promulgated by the Corporation.

(Emphasis added.) Because plaintiff was not afforded a hearing, the Court must enjoin defendants from deducting $11,934.71 from plaintiff's monthly allotment checks beginning on October 1, 1983, until defendants have complied with this statutory requirement.

Furthermore, the Court finds that defendants may not deduct any amounts from plaintiff's monthly grant allotments for fiscal year 1983. Defendants sought to deduct $11,934.71 on a monthly basis beginning in October 1983, "[p]ursuant to the Corporation policy on excess fund balances adopted by the Board of Directors in 1982 and the Instruction on Recipient Fund Balances *effective February 4, 1983.*" Exhibit 1 attached to Complaint (emphasis added). The final fund balance policy was published in the Federal Register on January 5, 1983. 48 Fed. Reg. 560 (1983).

Title 42, United States Code, section 2996g(e) provides that:

> The Corporation shall afford notice and reasonable opportunity for comment to interested parties prior to issuing rules, regulations, and guidelines, and *it shall publish in the Federal Register at least 30 days prior to their effective date all its rules, regulations, guidelines and instructions.*

(Emphasis added.) Because the Instruction on Recipient Fund Balances was not published in the Federal Register until January 5, 1983, it did not become effective until February 4, 1983. When plaintiff was awarded its current grant on January 1, 1983, LSC's fund balance policy was not yet in effect. The Court finds 45 C.F.R. § 1606.4 controlling in this situation. It states that:

> A grant or contract may be terminated on any of the grounds and under the circumstances stated in § 1606.3, except that *termination shall not be based on a Corporation* rule, regulation, guideline, or *instruction that was not in effect when the current grant was made or when the current contract was entered into.*

45 C.F.R. § 1606.4 (1982) (emphasis added). Because the fund balance instruction was not in effect when the current grant was made on January 1, 1983, termination cannot be based on this instruction during the current contract year.

The Court reaches this conclusion despite the fact that the notice published in the Federal Register indicates that:

> The purpose of this instruction is to provide notice and direction to recipients of Legal Services Corporation funding in meeting the terms of *a Special condition regarding recipient fund balances to be placed upon 1983 grant awards.*

48 Fed. Reg. 560 (1983) (emphasis added.) The fact that plaintiff was put on notice of a change in LSC's fund balance policy in January 1983 is not the determining factor in this case. The statute specifically states

that instructions must be published in the Federal Register at least thirty days prior to their effective date. Moreover, its implementing regulations indicate that a termination shall not be based on an instruction that was not in effect when the current grant was made. Defendants' assertion that it has had a fund balance policy since its inception also is of no legal significance. Defendants' fund balance policy could not become effective before February 4, 1983, thirty days after publication in the Federal Register.[2]

Accordingly, the Court enjoins defendant LSC and its employees and agents from withholding funds awarded to plaintiff until defendants have satisfied the provisions of 42 U.S.C. § 2996j and its implementing regulations, 45 C.F.R. §§ 1606.5-1606.6 (1982) as well as 45 C.F.R. § 1606.4 (1982).

An appropriate order is attached.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

Dated: October 4, 1983, *nunc pro tunc* September 30, 1983.

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[2] Therefore, when plaintiff was awarded its current contract on January 1, 1983, LSC's policy on fund balances found in its "Audit and Accounting Guide for Recipients and Auditors" remained in effect. This guide states in pertinent part:

> [EALS] recognizes grant funds from LSC as support on a straight-line basis over the grant period. Funds remaining unexpended at the end of an accounting period are recorded in the LSC fund balance. In accordance with a general LSC policy, [*EALS*] *may use unspent funds in future periods as long as expenses incurred are in compliance with the specified terms of the LSC grant, as defined.* LSC may, at its discretion, request reimbursement for expenses or return of unexpended funds, or both, as a result of noncompliance by [EALS] with the terms of the grant. In addition, if [EALS] terminates its LSC grant activities, all unexpended funds are to be returned to LSC.

Plaintiff's Exhibit 2 introduced into evidence (emphasis added).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-2813

EAST ARKANSAS LEGAL SERVICES,
Plaintiff

v.

LEGAL SERVICES CORPORATION, *et al.*,
Defendants

[Filed Oct. 4, 1983]

ORDER

Upon consideration of plaintiff's motion for a preliminary injunction, defendants' opposition thereto, the parties agreement to consolidate this matter on the merits, oral argument of the parties and testimony from John Sizemore, Executive Director of East Arkansas Legal Services, on September 30, 1983, the entire record herein, and for the reasons stated in the accompanying memorandum opinion, it is by the Court this 4th day of October 1983, *nunc pro tunc* September 30, 1983,

ORDERED that judgment be and hereby is entered for plaintiff; it is further

ORDERED that defendants are enjoined from withholding funds awarded to plaintiff until defendant has satisfied the provisions of 42 U.S.C. § 2996j and its implementing regulations, 45 C.F.R. §§ 1606.5-1606.6 (1982) as well as 45 C.F.R. § 1606.4 (1982); and it is further

ORDERED that this action be and hereby is dismissed.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-2813

EAST ARKANSAS LEGAL SERVICES, a corporation, P.O. Box 1149, 717 E. Broadway, Memphis, AR 72301 (501) 732-6370,

Plaintiff,

v.

LEGAL SERVICES CORPORATION, a corporation, DONALD BOGARD, President, DENNIS DOUGHERTY, Vice President, and GREG HARTLEY, Director of the Office of Field Services, 733 15th Street, N.W., Washington, D.C. 20005, (202) 272-4040,

Defendants.

[Filed Sept. 23, 1983]

ORDER

Upon consideration of Plaintiff's Application for a Temporary Restraining Order, the Verified Complaint and Exhibits thereto, the Memorandum of Points and Authorities in support thereof, Defendants' Opposition thereto, and the arguments of counsel, and it

APPEARING to the Court that Plaintiff will suffer substantial and irreparable harm unless the relief they request is granted; therefore, it is, this 23rd day of September, 1982 hereby Ordered:

1. that Plaintiff's application for a Temporary Restraining Order be and the same is hereby granted; and

2. It is FURTHER ORDERED that the Defendants, its officers, agents, employees and those acting in active concert with them are restrained and enjoined from withholding, setting off, recapturing, or in any other way terminating in whole or in part any funds awarded to the Plaintiff until determination of the preliminary inj. which shall be heard Fri. Sept 30 at 1:45 p.m.

3. IT IS FURTHER ORDERED that plaintiffs shall be required to post nominal bond in the sum of one hundred dollars or give security as a condition of the issuance of this temporary restraining order.

/s/ June L. Green
Judge

Sept. 23, 1983
3:35 p.m.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 83-02813

No. 83-2118

EAST ARKANSAS LEGAL SERVICES
A CORPORATION

v.

LEGAL SERVICES CORPORATION, *et al.*,
Appellants

[Filed Oct. 31, 1983]

Before: WRIGHT, EDWARDS and GINSBURG, *Circuit Judges*

ORDER

Upon consideration of appellants' motion for summary reversal, it is

ORDERED by the Court that the motion is denied. The merits of this case are not so clear that summary reversal is warranted. *See Ambach* v. *Bell*, 686 F.2d 976, 979 (D.C. Cir. 1982).

The Court also notes that three weeks lapsed between the District Court's entry of the order from which movants have appealed and filing of the instant summary reversal motion. Without accounting for their allowance

of the three-week lapse, movants ask this Court to act within less than one week. In presenting this request, movants have failed to comply with Rule 6(j) of the General Rules of this Court.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Daniel M. Gathey
DANIEL M. GATHEY
First Deputy Clerk

Circuit Judge Edwards did not participate in this order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

Civil Action No. 83-02813

No. 83-2118

EAST ARKANSAS LEGAL SERVICES
A CORPORATION

v.

LEGAL SERVICES CORPORATION, *et al.*,
Appellants

[Filed Oct. 16, 1984]

Before: MIKVA and STARR, *Circuit Judges*, and MCGOWAN, *Senior Circuit Judge*

ORDER

On consideration of the Petition for Rehearing of Appellants, filed September 27, 1984, it is

ORDERED, by the Court, that the aforesaid Petition is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

Civil Action No. 83-02813

No. 83-2118

EAST ARKANSAS LEGAL SERVICES
A CORPORATION

v.

LEGAL SERVICES CORPORATION, *et al.*,
Appellants

[Filed Oct. 16, 1984]

Before: ROBINSON, *Chief Judge*; WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges*

ORDER

The Suggestion for Rehearing *en banc* of Appellants has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

Civil Action No. 83-02813

No. 83-2118

EAST ARKANSAS LEGAL SERVICES
A CORPORATION

v.

LEGAL SERVICES CORPORATION, *et al.*,
Appellants

[Filed Nov. 19, 1984]

Before: MIKVA and STARR, *Circuit Judges and* MCGOWAN, *Senior Circuit Judge*

ORDER

On consideration of appellants' motion to stay issuance of the mandate, it is

ORDERED, by the Court, that the Clerk is directed to stay the issuance of this Court's mandate through January 16, 1985.

Counsel is directed to promptly advise this Court of the filing of any petition for *writ of certiorari* with the Supreme Court.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Resolution on Fund Balance Policy

WHEREAS sound fiscal and managerial policy requires that recipients be allowed to maintain some operating reserves for contingent liabilities and unforeseen costs; and

WHEREAS the Corporation must ensure that appropriated funds are being spent to provide economical and effective legal assistance to eligible clients;

THEREFORE BE IT RESOLVED:

1) That recipients be permitted to budget for, maintain, and carry-over up to ten percent of their annualized LSC grant;

2) That recipients be permitted to apply to the Corporation for a waiver of the ten percent ceiling, and the Corporation shall respond to requests for waivers on a case-by-case basis;

3) That the Corporation may permit a recipient to budget, reserve, and/or carry-over a sum in excess of ten percent of its annualized LSC grant where it would be prudent and in the best interests of the delivery of the highest quality legal services in the most effective and economical manner;

4) That in no case will the Corporation permit a recipient to carry-over a sum in excess of twenty-five percent of its annualized LSC grant;

5) That all grants made by the Corporation, beginning with those for 1983, shall contain a condition stating that any amount carried over by a recipient in excess of ten percent of its annualized LSC grant, or in excess of the level permitted by the Corporation upon prior application, will be set off against grant payments made to the recipient for that year; and

6) That any set-off against a recipient's grant shall be made only after the Corporation has determined the level of funds actually carried over at the close of the recipient's previous fiscal year.

No. 84-1115

FILED
FEB 11 1985
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

LEGAL SERVICES CORPORATION, *et al.*,
Petitioners,

v.

EAST ARKANSAS LEGAL SERVICES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals correctly affirmed the decision of the District Court in holding that LSC's proposed reductions in payment of a grant awarded to EALS pursuant to a policy not yet effective constituted a termination of the grant thereby requiring LSC to initiate termination procedures before such action could become final.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1115

LEGAL SERVICES CORPORATION, *et al.*,
Petitioners,

v.

EAST ARKANSAS LEGAL SERVICES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent East Arkansas Legal Services (EALS)[1] opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia filed by the Legal Services Corporation (LSC). EALS contends that the opinion of the Court of Appeals[2] below, affirming the decision of the District Court,[3] is a correct

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[1] EALS is a private non-profit organization. There is no parent, subsidiary or affiliate of EALS.

[2] The opinion is reported at 742 F.2d 1472 (D.C. Cir. 1984) and is reproduced in petitioners' appendix at 1a-24a.

[3] Civil action No. 83-2813 (D.D.C. October 4, 1983), reproduced in petitioners' appendix at 25a-32a.

decision which raises no considerations described in Rule 17 of this Court and no issue properly reviewable by a Writ of Certiorari.

SUPPLEMENTAL STATEMENT OF THE CASE

The facts of the case are stated in the decision of the District Court (petitioners' appendix at 25a-31a) and the Court of Appeals (petitioners' appendix at 1a-24a), *Legal Services Corporation v. East Arkansas Legal Services*, 742 F.2d 1472 (D.C. Cir. 1984).

In petitioners' statement of the case, certain inaccuracies appear. On pages five-six of its petition, LSC asserts that it had a corporate policy since its inception requiring legal services programs to obtain approval to expend fund balances in excess of 10% of their grant and that this policy was subsequently modified by the Board of Directors of LSC on October 5, 1982 in order to preclude grantees from carrying over funds in excess of 10% of their grants[4] (unless LSC granted a waiver of up to 25%). In fact, as found by the District Court, the only policy in effect during this period and during the period when the grant in question was awarded, January 1, 1983, was the policy set forth in the Audit and Accounting Guide for Recipients and Auditors. That policy permitted the use of unspent funds in future grant periods as long as the expenditures were consistent with the terms of the grant. (Petitioners' appendix at 31a). The Board of Directors' resolution did not legally establish a new policy until February 4, 1983, thirty days after its publication in the Federal Register.

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[4] LSC also incorrectly refers to this directive as its valid policy in the formulation of its first question presented for review (petition, at (i)) and in its argument section of the petition (petition, at 8-10).

REASONS FOR DENYING CERTIORARI

I. The Traditional Reasons for Granting Review on Certiorari Are Not Present in This Case

Under Rule 17 of the Supreme Court Rules, this Court grants reviews of writs of certiorari as a matter of judicial discretion, only where there are "special and important reasons". No such reasons are present in the instant case. There is no conflict with other federal courts of appeals or state courts; there has been no departure from usual judicial proceedings; and there are no important questions of federal law involved. See 28 U.S.C. Rule 17.1(A) and (C) (1984). Further, LSC has not shown that this case affects any other litigation. To the best of respondent's knowledge, no other cases raise the same issues.

Despite LSC's allusions to a nationwide problem of $41 million in unexpended balances during 1982 and its concern with recapture of those funds, the limited objective of this lawsuit was the release to EALS of two grant allotments totaling approximately $24,000.00. It was not filed as a class action. LSC released those funds in response to the litigation and there has been no indication it intends to seek recoupment. Those grant funds presumably have now been spent and new grants to EALS have been made in conformity with the fund balance policies in effect at the time of the grants.

The fund balance policy challenged successfully as ineffective at the time the grant in question was made became effective soon thereafter. Since early 1983, it has been significantly modified twice[5] and those subsequent versions applied to carryover balances for later periods. Those changes and the passage of time further diminish any possible relevance of this Court's review of an old policy applicable to a period two years ago.

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[5] The first revision is found at 49 Fed. Reg. 49710, October 27, 1983. Modified a second time, the current fund balance policy is contained in 45 C.F.R. § 1628 (1984).

The special and important reasons identified in Rule 17 "imply a reach to a problem beyond the academic or the episodic," *Rice v. Sioux City Memorial Park Cemetary*, 349 U.S. 70, 74 (1955), whereas, in this case, the issues are of isolated and academic significance only.

II. The Decision Below Is Manifestly Correct

The Court of Appeals affirmed the decision of the United States District Court for the District of Columbia which held that LSC's proposed withholding of funds from EALS constituted a termination of its grant within the meaning of 45 C.F.R. § 1606.2(a) (1983) and that EALS was therefore entitled to a hearing under 42 U.S.C. § 2996j(2). LSC's withholding of two allotments constituted a decision that financial assistance be terminated prior to the expiration of the grant within the definition of termination in 45 C.F.R. § 1606.2(a) (1983). LSC argued that the offset was not a termination of financial assistance as set forth in 42 U.S.C. § 2996j because EALS' "annualized level of funding," the total funds available, was not reduced prior to the expiration of the grant. (Petitioners' appendix at 11a). The concept of "annualized level of funding" is a hypertechnical term for internal budget procedures, which was not defined by regulation until after this lawsuit was filed and is not found in the enabling statute. EALS successfully argued below that such resources were irrelevant insofar as a grantee retained statutory and regulatory rights to invoke administrative procedures in challenging a decision to withhold portions of a grant awarded to it. The Court correctly concluded that the term "financial assistance" referred to the grant award for a given year not to the funds potentially available to a grantee. (Petitioners' appendix at 11a-13a). The statutory reference in 42 U.S.C. § 2996j was to termination of "financial assistance" not to "annualized level of funding".

LSC's own regulations are consistent with this interpretation. See 45 C.F.R. § 1601.2(a), § 1623.2. Since LSC decided to reduce the amount it would actually provide under the grant, it was required to adhere to its own statutory and regulatory provisions triggering notice and hearing requirements under 42 U.S.C. § 2996j and 45 C.F.R. § 1606.5-1606.6 (1982).

LSC also argues that even if the offset were a termination, EALS waived its rights under 5 C.F.R. § 1606.4 because its executive director became aware that LSC intended to change the policy. The Court correctly found that whatever notice EALS received it did not comport with the hearing requirements mandated both by the regulations and LSC's enabling statute. (Petitioners' appendix at 17a). The steps that LSC took to develop a new fund balance policy were preliminary; no new policy superseding the audit guide policy could even arguably be valid and effective until February 4, 1983, thirty days after publication in the Federal Register in accordance with the requirements of 42 U.S.C. § 2996g(e), and subsequent to issuance of the 1983 grant.

LSC contends on pages twelve-thirteen of its petition that EALS waived its statutory and regulatory rights to a hearing because of its acceptance of the grant in which a special condition was attached purporting to require it to be bound by the unpublished fund balance policy. The Court noted that the grant agreement was not made part of the record. (Petitioners' appendix at 18a). Had LSC introduced the grant documents, an issue of whether EALS actually agreed to comply with the fund balance policy would have been raised since EALS specifically stated at the time it did not waive any of its statutory or constitutional claims. Regardless, as the Court recognized, since this issue was never properly before the District Court, the Court of Appeals refused to consider it. (Petitioners' appendix at 18a-19a). In its petition, LSC offers no reason why this Court should

depart from its general policy of not deciding questions which have not been resolved in the lower courts. *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Petitioners' second question for review is whether the entry of a permanent injunction by the district court was violative of the public interest. The Order provided that "defendants [were] enjoined from withholding funds awarded to plaintiff until defendant [had] satisfied the provisions of 42 U.S.C. § 2996j and its implementing regulations, 45 C.F.R. § 1606.5-1606.6 (1982) as well as 45 C.F.R. § 1606.4 (1983)."

The permanent injunction here was narrow in scope, limited to the facts in this case, and issued to implement the judgment of the Court. The Court issued this permanent injunction once a determination favorable to EALS on the merits was made. Contrary to the implication contained on pages fourteen-fifteen of LSC's petition, the injunction applied only to EALS, not to other legal services program, and did not extend beyond requiring LSC to comply with the statutory and regulatory provisions governing its activities. (Petitioners' appendix at 32a).

It is evident that the public interest is served when an agency complies with its enabling statute and implementing regulations. Once a determination had been made that LSC violated its own statutory and regulatory hearing requirements, it was appropriate to enjoin it from taking any action against EALS circumventing those regulations.

LSC further argues on page fourteen of its petition that it believes an injunction should not have been entered because EALS would not have otherwise been irreparably injured. It provided no further argument in support of this position, although it stated EALS would have had $705,000 at its disposal in 1983. The District

Court specifically found substantial and irreparable injury when it granted the temporary restraining order. (Petitioners' appendix at 33a). Exhibit four to EALS' complaint detailed the crisis for the program and its clients which would have resulted from a $24,000 reduction in payments. Whatever carryover balance existed in the beginning of 1983 was expected to disappear by the end of the year. (Transcript of September 30, 1983 hearing, at 12). This testimony and exhibit were uncontroverted by LSC.

As a separate issue for review, a challenge to the appropriateness of the permanent injunction is wholly lacking in substance and provides no valid basis for review by this Court.

CONCLUSION

The issues presented in the petition neither possess importance nor otherwise merit review by this Court. Moreover, the decisions below were eminently correct in their conclusions and achieved a just result.

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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